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## TAKING THE SECOND STEP: SECTION 924(c) SENTENCING DISPARITIES AS AN EXTRAORDINARY AND COMPELLING REASON FOR COMPASSIONATE RELEASE

OLIVIA WILLIAMS\*

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## INTRODUCTION

“[A]n aircraft hijacker ..., a terrorist who detonates a bomb ..., a second-degree murderer, [and] a rapist’ ... would all be subject to less harsh sentences” than Marion Hungerford.<sup>1</sup> In 2005, a federal court had no choice but to sentence Hungerford, a woman with severe borderline personality disorder and no criminal history, to 159 years in federal prison.<sup>2</sup> Although Hungerford never handled a gun, she was convicted of seven counts of using a firearm during a crime of violence under 18 U.S.C. § 924(c).<sup>3</sup> The Ninth Circuit upheld her sentence, but not without condemning the “irrational, inhumane, and absurd” mandatory minimum sentencing scheme that left the court with no alternative.<sup>4</sup>

Section 924(c) criminalizes the use of a firearm during a crime of violence or drug trafficking offense and provides harsh mandatory minimum sentences.<sup>5</sup> These sentences must be served consecutively with the underlying crime and with each other.<sup>6</sup> For instance, a defendant convicted of two § 924(c) violations arising from a robbery would first serve the sentence imposed for robbery.<sup>7</sup> The defendant would then serve the first § 924(c) sentence, followed by the second § 924(c) sentence.<sup>8</sup>

A defendant’s first § 924(c) charge carries a five-, seven-, or ten-year sentence for possessing, brandishing, or discharging a firearm,

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1. *See* *United States v. Rivera-Ruperto*, 884 F.3d 25, 32 (1st Cir. 2018) (Barron, J., concurring) (second and fourth alterations in original) (quoting *United States v. Rivera-Ruperto*, 852 F.3d 1, 31 (1st Cir. 2017) (Torruella, J., dissenting)). Mr. Rivera was sentenced to 161 years in prison, 130 of which resulted from six convictions under 18 U.S.C. § 924(c). *Id.* at 25.

2. *See* Clair Johnson, *Anaconda Woman’s Daughter to Keep Fighting 159 Year Sentence*, MONT. STANDARD (Dec. 9, 2007), [https://mtstandard.com/news/state-and-regional/anaconda-woman-s-daughter-to-keep-fighting-year-sentence/article\\_e82ad36a-42fc-5c53-b303-d24d74988cca.html](https://mtstandard.com/news/state-and-regional/anaconda-woman-s-daughter-to-keep-fighting-year-sentence/article_e82ad36a-42fc-5c53-b303-d24d74988cca.html) [<https://perma.cc/UZQ6-NEQL>].

3. *United States v. Hungerford*, 465 F.3d 1113, 1119 (9th Cir. 2006) (Reinhardt, J., concurring).

4. *Id.* at 1118.

5. 18 U.S.C. § 924(c)(1)(A), (C); *see Hungerford*, 465 F.3d at 1119.

6. § 924(c)(1)(D)(ii).

7. *See id.*

8. *Id.*; *see Hungerford*, 465 F.3d at 1114; *United States v. Rivera-Ruperto*, 884 F.3d 25, 42 (1st Cir. 2018) (Barron, J., concurring).

respectively.<sup>9</sup> This portion of the law remains the same today; however, the First Step Act substantively changed § 924(c) for the better by limiting the potential sentence of a defendant charged with two or more counts of § 924(c) in the same indictment.<sup>10</sup>

Before the First Step Act (FSA) passed on December 21, 2018, federal courts were required to “stack” multiple § 924(c) counts.<sup>11</sup> This meant that second and subsequent convictions, even when arising out of the same course of conduct, carried harsher penalties than the first conviction.<sup>12</sup> In other words, defendants with no criminal history were treated as repeat offenders and accordingly received harsher sentences. Under the prior version of § 924(c), each stacked sentence carried an additional twenty-five years; as a result, defendants faced greater-than-life sentences.<sup>13</sup> Take Marion Hungerford’s sentence as an illustration of this pre-FSA sentencing scheme. Hungerford was sentenced to four years for one count of conspiracy and seven counts of robbery because all eight counts ran concurrently.<sup>14</sup> She received five additional years—which ran consecutively—for her first § 924(c) conviction because her co-defendant carried a gun during the robberies.<sup>15</sup> Hungerford faced six additional § 924(c) charges, and for each of these charges she received an additional twenty-five years, adding up to 155 years.<sup>16</sup> So,

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9. § 924(c)(1)(A)(i)-(iii).

10. See U.S. SENT’G COMM’N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 34-35 (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831\\_First-Step-Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf) [<https://perma.cc/LD6G-9B7Q>].

11. *Id.*; see *Deal v. United States*, 508 U.S. 129, 135 (1993).

12. U.S. SENT’G COMM’N, *supra* note 10, at 34-35 (“This practice of charging multiple violations of section 924(c) within the same proceeding has commonly been referred to as ‘stacking’ of mandatory minimum penalties.”).

13. See *id.* at 1, 34-35; *Rivera-Ruperto*, 884 F.3d at 25 (Barron, J., concurring) (“[Section] 924(c) did not merely permit this greater-than-life-without-parole sentence. It mandated it.”).

14. *Hungerford v. United States*, 465 F.3d 1113, 1114 (9th Cir. 2006).

15. *Id.* at 1114, 1119. Hungerford’s co-defendant, Dana Canfield, was the “principal in the robberies.” *Id.* at 1119. After Hungerford’s husband of twenty-six years moved out of their house, Canfield swooped in as her new male companion. *Id.* Apart from driving Canfield to and from the robberies, Hungerford had no active role in the crimes. *Id.* Canfield was the one who owned and brandished the firearm, “yet he reached an agreement with the government and received a sentence of 32 years.” *Id.* at 1121. It is also important to note that, although a gun was brandished, no one was physically harmed during this crime spree, and less than \$10,000 was stolen. *Id.* at 1119.

16. See *id.* at 1114. The prosecutor was not mandated to charge Hungerford with all seven § 924(c) charges. *Id.* at 1121. In fact, “[t]he prosecutor used his discretion to send the mentally-ill Hungerford to prison until she turns 208, while he administered a far lesser

155 years of Hungerford's total 159-year sentence were based solely on possessing a gun, which she in fact never carried.

Congress recognized these sentencing injustices and eliminated the stacking provision of § 924(c) in the First Step Act.<sup>17</sup> Under the new scheme, multiple § 924(c) convictions arising out of the same indictment are no longer considered “second or subsequent” to the first and thus do not carry enhanced twenty-five-year sentences.<sup>18</sup> In other words, first time § 924(c) offenders are no longer sentenced as if they were repeat, career criminal offenders. As a result of this change, second and subsequent convictions now carry the same sentence length as the first conviction: five, seven, or ten years.<sup>19</sup> Had Hungerford been sentenced in 2019, she would have received thirty-five years on gun charges alone (seven five-year sentences), and her total sentence would have amounted to thirty-nine years (adding an additional four years for conspiracy and robbery).<sup>20</sup> Under the new statutory scheme, Hungerford's sentence would be 120 years less than her 2005 sentence. Of note, this significant change in law—which, in cases like Hungerford's, results in removing over a century's worth of time from a sentence—was not made retroactive.<sup>21</sup>

Fortunately, the First Step Act did not preclude Hungerford from relief. “In an exceedingly rare turn of events,” a new prosecutor looked at Hungerford's case, “recognized the egregious injustice that had been done,” and agreed to reduce her sentence to seven years.<sup>22</sup> Because Hungerford had already served seven years, she was eligible for release shortly thereafter.<sup>23</sup> Many inmates, however, are not afforded the same extraordinary prosecutorial discretion and

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punishment ... to the principal who put the lives of others at risk.” *Id.*

17. See U.S. SENT'G COMM'N, *supra* note 10, at 35; see also *United States v. Urkevich*, No. 8:03CR37, 2019 WL 6037391, at \*4 (D. Neb. Nov. 14, 2019) (reducing a defendant's sentence post-FSA based in part on “the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed”).

18. See U.S. SENT'G COMM'N, *supra* note 10, at 35.

19. See *id.*

20. See *id.*

21. See First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5221-22.

22. Emma Andersson, *Why Low-Level Offenders Can Get Longer Sentences Than Airplane Hijackers*, ACLU (May 24, 2018, 6:00 PM), <https://www.aclu.org/blog/smart-justice/sentencing-reform/why-low-level-offenders-can-get-longer-sentences-airplane> [https://perma.cc/T43M-8W7Q].

23. *Sentence Reduced*, KULR8 (Aug. 20, 2013), [https://www.kulr8.com/news/sentence-reduced/article\\_190ec1c0-ca91-58fa-af7a-614f79cfd403.html](https://www.kulr8.com/news/sentence-reduced/article_190ec1c0-ca91-58fa-af7a-614f79cfd403.html) [https://perma.cc/MU6M-RTPW].

instead remain behind federal prison bars serving decades upon decades of time under the previous § 924(c) sentencing scheme.

Although Congress did not retroactively apply its changes to § 924(c),<sup>24</sup> it provided a glimmer of hope to defendants sentenced under the old scheme. The First Step Act, in addition to changing § 924(c), significantly altered the compassionate release process.<sup>25</sup> In particular, Congress intended to increase the use of “compassionate release,” the process of reducing a federal inmate’s sentence based on “extraordinary and compelling reasons.”<sup>26</sup> Before December 21, 2018, wardens within the Bureau of Prisons (BOP) could file a motion for compassionate release with the courts based on certain limited factors: terminal illness, age, extenuating family circumstances, and other “extraordinary and compelling reason[s]” as “determined by the Director of the Bureau of Prisons.”<sup>27</sup> Thus, the BOP functioned as the sole gatekeeper of the release process.<sup>28</sup> Congress, aiming to “[i]ncreas[e] the use and transparency of compassionate release,” transferred this power to inmates, empowering them to petition the courts directly for release.<sup>29</sup>

Once a defendant files a motion for compassionate release, the court has the discretion to reduce the defendant’s sentence after considering the sentencing factors listed in 18 U.S.C. § 3553(a), if the court finds that “extraordinary and compelling reasons” warrant a reduction.<sup>30</sup> Importantly, one of the sentencing factors in § 3553(a) that the court must consider is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>31</sup>

This Note argues that courts are empowered to, and should, grant compassionate release based *solely* on the sentencing disparities

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24. See First Step Act § 403(b).

25. See *id.* § 603(b).

26. See FAMM, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 1, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [<https://perma.cc/3UQC-ZBQM>]; U.S. SENT’G GUIDELINES MANUAL § 1B1.13(1)(A) (U.S. SENT’G COMM’N 2018).

27. See U.S. SENT’G COMM’N, *supra* note 10, at 46; U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1.

28. See *United States v. Redd*, 444 F. Supp. 3d 717, 726 (E.D. Va. 2020).

29. First Step Act § 603(b); see U.S. SENT’G COMM’N, *supra* note 10, at 47.

30. 18 U.S.C. § 3582(c)(1)(A); see First Step Act § 603(b).

31. 18 U.S.C. § 3553(a)(6).

created by the First Step Act—specifically, the significant changes to § 924(c)’s sentencing scheme. Recently, district courts across the country have granted motions for compassionate release based on these sentencing disparities coupled with the COVID-19 pandemic or significant rehabilitation.<sup>32</sup> The pandemic and rehabilitation, however, are relatively minor reasons for release when compared to the injustice of defendants serving decades or centuries of time greater than what Congress now deems sufficient.<sup>33</sup> The First Step Act provides courts significantly more power and discretion to reduce sentences based on extraordinary and compelling reasons.<sup>34</sup>

Clearly, Congress found these unjust sentences—like Hungerford’s—extraordinary and compelling enough to warrant a fundamental change in the law. Although Congress did not apply § 924(c)’s new sentencing scheme retroactively, this does not detract from this Note’s argument. Congress likely saw a logistical nightmare with releasing each defendant whose sentence would be markedly lower under the new § 924(c) sentencing scheme, and instead intended for a slower, individualized process through the courts’ new compassionate release power.<sup>35</sup> Thus, this Note argues that district courts need not examine defendants’ rehabilitation efforts or health records when granting compassionate release motions based on sentencing disparities. It is within the district

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32. *See, e.g.*, *United States v. Brown*, 457 F. Supp. 3d 691, 701 (S.D. Iowa 2020) (“[E]xceptional rehabilitation; large sentencing disparities; and COVID-19’s unprecedented dangers all constitute extraordinary and compelling reasons to grant compassionate release.”); *United States v. Decator*, 452 F. Supp. 3d 320, 325-26 (D. Md. 2020) (granting the defendant’s motion for compassionate release based on sentencing disparities and significant rehabilitation); *Bellamy v. United States*, 474 F. Supp. 3d 777, 786 (E.D. Va. 2020) (granting the defendant’s motion for compassionate release based on his young age at the time of offense, sentencing disparities, and rehabilitative efforts).

33. *See, e.g.*, *United States v. Arey*, 461 F. Supp. 3d 343, 351 (W.D. Va. 2020) (finding sentencing disparity a more compelling reason for release than the COVID-19 pandemic).

34. STEPHEN R. SADY & ELIZABETH G. DAILY, *COMPASSIONATE RELEASE BASICS FOR FEDERAL DEFENDERS 1* (2019), [https://or.fd.org/system/files/case\\_docs/Compassionate%20Release%20Basics\\_REVISED\\_2templates.pdf](https://or.fd.org/system/files/case_docs/Compassionate%20Release%20Basics_REVISED_2templates.pdf) [<https://perma.cc/AT8C-6AYM>] (“For over three decades, the BOP claimed unlimited and unreviewable discretion .... All that has fundamentally changed because ... the President signed the First Step Act of 2018 into law.”).

35. *See United States v. McCoy*, 981 F.3d 271, 286-87 (4th Cir. 2020) (“[T]here is a significant difference between automatic vacatur and resentencing of an entire class of sentences—with its ‘avalanche of applications and inevitable re-sentencings’-and allowing for the provision of individual relief.”).

courts' power and discretion to remedy these unjust sentences by pointing to the sentencing disparity alone.

Part I of this Note provides background on the two relevant sections of the First Step Act: changes to the compassionate release process and changes to the § 924(c) sentencing scheme. Part II examines recent district court opinions addressing § 924(c) sentencing disparities as “extraordinary and compelling reasons” for reduced sentences. Part III argues that courts are empowered to grant compassionate release to inmates convicted of multiple § 924(c) charges under the old sentencing scheme because of the sentencing disparities the First Step Act created. Finally, the Note concludes by urging courts to take the second step Congress was unwilling to take itself.

#### I. THE FIRST STEP ACT: CREATING BOTH THE PROBLEM AND THE SOLUTION

Because Congress did not make its changes to the § 924(c) stacking provision retroactive, defendants must seek relief from their unjust sentences through the compassionate release process. A defendant must convince a district court that it has the discretion to determine what constitutes “extraordinary and compelling” reasons for release, and that the non-retroactivity of the § 924(c) amendment alone constitutes an “extraordinary and compelling” reason for release.<sup>36</sup>

##### *A. The Redeeming Feature of the First Step Act: Compassionate Release Under 18 U.S.C. § 3582*

As part of the Sentencing Reform Act of 1984, Congress enacted compassionate release, which allows federal prisoners to request a sentence reduction based on “extraordinary and compelling” reasons.<sup>37</sup> The Act abolished federal parole,<sup>38</sup> as such, compassionate release was created as a “safety valve” to remedy the resulting

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36. See *infra* Part I.A.

37. See William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 852 (2009).

38. *Id.* at 851.

injustices.<sup>39</sup> Initially, the BOP acted as the sole gatekeeper for compassionate release requests, as Congress granted the BOP “unlimited and unreviewable discretion.”<sup>40</sup> However, the BOP did not file for compassionate release on behalf of inmates as often as Congress had intended.<sup>41</sup> As a result, Congress significantly altered the process in the First Step Act of 2018.<sup>42</sup> The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), now allows defendants to petition the court directly for release should the BOP deny or ignore their request for release.<sup>43</sup> This change effectively strips the BOP of its gatekeeping role and empowers courts with a significant amount of discretion.<sup>44</sup> However, the compassionate release process is complex, and portions of the relevant law have not been updated to reflect the new amendment to § 3582.<sup>45</sup>

### 1. *The Compassionate Release Statute*

Section 3582(c) is the compassionate release statute;<sup>46</sup> it governs the modification of an imposed sentence based on extraordinary and compelling reasons.<sup>47</sup> The First Step Act amended the statute, empowering district courts to consider motions filed by defendants directly rather than consider ones only filed by the BOP.<sup>48</sup> Now, a defendant can bring a motion whenever he or she “has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf,” or after “the

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39. *See id.* at 852.

40. SADY & DAILY, *supra* note 34, at 1.

41. *See* NIEMAN L. GRP. COMPASSIONATE RELEASE, THE FIRST STEP ACT, AND COVID-19: EVERYTHING YOU NEED TO KNOW 1-2 (2021), <https://niemanlaw.com/compassionate-release/> [<https://perma.cc/45YG-38BS>].

42. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239-41; SADY & DAILY, *supra* note 34, at 1; *see also* United States v. Redd, 444 F. Supp. 3d 717, 725 (E.D. Va. 2020) (“The First Step [Act] was passed against the backdrop of a documented infrequency with which the BOP filed motions for a sentence reduction on behalf of defendants.”).

43. *See* SADY & DAILY, *supra* note 34, at 1; 18 U.S.C. § 3582(c)(1)(A).

44. *See* Redd, 444 F. Supp. 3d at 721, 726.

45. *See infra* Part I.A.2.

46. *See* SADY & DAILY, *supra* note 34, at 1.

47. *See* § 3582(c)(1)(A).

48. *See* First Step Act of 2018, Pub. L. No 115-391, § 603(b)(1), 132 Stat. 5194, 5239.

lapse of 30 days from the receipt of such request by the warden of the defendant's facility, whichever is earlier."<sup>49</sup>

Once a motion is before the court, whether filed by a defendant or the BOP, § 3582(c) requires the court to consider the applicable sentencing factors set forth in 18 U.S.C. § 3553(a).<sup>50</sup> Two factors are particularly relevant to this Note: (1) "the need for the sentence imposed,"<sup>51</sup> and (2) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."<sup>52</sup>

After considering these factors, the court may reduce a sentence if it finds that (1) "extraordinary and compelling reasons warrant such a reduction"; and (2) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."<sup>53</sup> It is the United States Sentencing Commission's role in the amended compassionate release process that sparks controversy.<sup>54</sup>

## 2. *The Sentencing Commission's Outdated Policy Statement*

When Congress created compassionate release in § 3582(c), it mandated that the Sentencing Commission define the phrase "extraordinary and compelling."<sup>55</sup> Specifically, 28 U.S.C. § 994(t) requires the Commission to complete three steps: (1) identify "what should be considered extraordinary and compelling reasons for sentence reduction" under § 3582(c); (2) include the applicable criteria; and (3) provide a list of specific examples.<sup>56</sup> Congress made clear, however, that the Commission should not define the defendant's rehabilitation *alone* as an "extraordinary and compelling" reason for release.<sup>57</sup>

Before November of 2007, the Sentencing Commission simply did not comply with § 994(t).<sup>58</sup> Its policy statement for § 3582(c),

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49. *Id.*

50. *See* § 3582(c)(1)(A).

51. 18 U.S.C. § 3553(a)(2).

52. § 3553(a)(6).

53. § 3582(c)(1)(A).

54. *See infra* Part I.A.2.

55. *See Berry, supra* note 37, at 861.

56. 28 U.S.C. § 994(t).

57. *See id.*

58. *See Berry, supra* note 37, at 861-62.

enumerated in the sentencing guidelines at section 1B1.13, did not define “extraordinary and compelling” reasons for sentence reductions or provide the applicable criteria.<sup>59</sup> Instead, it recapitulated § 3852(c): it simply said that the BOP could determine what constituted “extraordinary and compelling” without providing any examples of what that could look like.<sup>60</sup> Thus, the BOP truly had complete discretion when making this determination as Congress and the Commission provided the BOP with no guidance.<sup>61</sup> Nevertheless, the compassionate release process continued without the criteria and examples the Commission should have issued.

The Sentencing Commission finally followed Congress’s directive in late 2007.<sup>62</sup> The Commission provided factual criteria and examples for the BOP to consider when determining whether an inmate had “extraordinary and compelling” reasons for release.<sup>63</sup> In particular, it listed four overarching categories of “[e]xtraordinary and compelling reasons”: (1) the defendant’s medical condition (often terminal illness); (2) age; (3) family circumstances; and (4) a catch-all provision for other reasons.<sup>64</sup>

The catch-all provision is most important to defendants similarly situated to Marion Hungerford—defendants who were sentenced under the prior § 924(c) sentencing scheme.<sup>65</sup> The catch-all provision provides that “an extraordinary and compelling reason other than, or in combination with” the other three categories may be *determined by the Director of the BOP*.<sup>66</sup> Importantly, this provision and

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59. *See id.*; U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2018).

60. *See Berry, supra* note 37, at 861-62.

61. *See id.*

62. *See id.* at 869.

63. *See id.*; U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)-(D) (U.S. SENT’G COMM’N 2018).

64. § 1B1.13 cmt. n.1(A)-(D); *see* U.S. SENT’G COMM’N, *supra* note 10, at 46.

65. *See supra* notes 17-22 and accompanying text. Defendants incarcerated under the old § 924(c) sentencing scheme must show extraordinary and compelling reasons for release not related to health, age, or family circumstances. Thus, they would have to be eligible for compassionate release under section 1B1.13 commentary note 1(D). Recently, however, district courts have granted compassionate release under a combination of the catch-all provision and the health provision based off of COVID-19 concerns. *See, e.g., United States v. Brown*, 457 F. Supp. 3d 691, 701 (S.D. Iowa 2020) (finding that COVID-19’s “unprecedented dangers” in combination with sentencing disparities constituted extraordinary and compelling reasons for release).

66. § 1B1.13 cmt. 1(D).

the rest of the policy statement have not been updated to reflect the First Step Act's modifications to compassionate release.<sup>67</sup> The statement still functions, erroneously, under the assumption that a court can grant compassionate release only “[u]pon motion of the Director of the Bureau of Prisons.”<sup>68</sup>

The outdated policy statement poses a problem for defendants relying on the catch-all provision under section 1B1.13 commentary note 1(D).<sup>69</sup> When defendants invoke the provision advocating for their release, courts are faced with the question of whether the provision limits relief to “other” extraordinary and compelling reasons as identified by the BOP wardens.<sup>70</sup> In other words, may a court itself determine what constitutes extraordinary and compelling reasons for compassionate release? Nearly every court of appeals has addressed this issue and has held that the phrase “as determined by the Director of the [BOP]” is inconsistent with the First Step Act.<sup>71</sup> As such, *courts*, and not the BOP, have the discretion to determine what constitutes extraordinary and compelling reasons for compassionate release.<sup>72</sup>

In reaching this conclusion, circuit courts point to legislative intent and the text of § 3582(c)(1)(A).<sup>73</sup> In *United States v. Brooker*, for example, the Second Circuit Court of Appeals explained that Congress did not view amending § 3582(c)(1)(A) to permit prisoner-initiated claims—“a break with over 30 years of procedure—as a minor or inconsequential change.”<sup>74</sup> In fact, the court noted that

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67. See U.S. SENT'G COMM'N, *supra* note 10, at 47. The Sentencing Commission explicitly acknowledges this: “[T]he policy statement at §1B1.13 does not reflect the First Step Act's changes. The procedural change implemented by the First Step Act, however, is being successfully implemented, with defendants filing motions for and obtaining compassionate release.” *Id.*

68. See § 1B1.13; First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

69. See *Bellamy v. United States*, 474 F. Supp. 3d 777, 784 (E.D. Va. 2020) (“The Government[] argu[es] that] ... ‘only the Bureau of Prisons has the authority to determine whether any other reason is “extraordinary and compelling” under a rigid application of U.S.S.G. § 1B1.13 n. (D).’”).

70. See *id.*

71. See, e.g., *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Brooker*, 976 F.3d 228, 235-36 (2d Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020). *But see* *United States v. Bryant*, 996 F.3d 1243, 1247-48 (11th Cir. 2021).

72. See *McCoy*, 981 F.3d at 284.

73. See, e.g., *Brooker*, 976 F.3d at 235.

74. *Id.*

Congresspersons called the change “‘expand[ing],’ ‘expedit[ing], and ‘improving’ compassionate release.”<sup>75</sup> Therefore, the court found that the language in policy statement requiring a “motion of the Director of the [BOP]” is “precisely the requirement that the First Step Act expressly removed.”<sup>76</sup> Accordingly, the court determined that its discretion is defined by § 3582(c)’s text as explicitly amended by the First Step Act rather than the Sentencing Commission’s conflicting policy statement.<sup>77</sup>

District courts, understanding that they have the discretion to determine what constitutes “extraordinary and compelling” reasons, still hesitate to grant compassionate release to defendants who did not retroactively receive the sentence leniency of the § 924(c) amendment. This Note argues that because courts can, in their discretion, determine that sentencing disparities alone constitute an extraordinary and compelling reason for release, they *should* in fact do so.

#### *B. The Harsh Realities of the First Step Act: Section 924(c) Sentencing Disparities*

On December 21, 2018, the day the First Step Act was enacted, Kenya Preston Williams was arrested in Northern Virginia.<sup>78</sup> A federal grand jury had indicted him on ten counts based on a string of armed convenience store robberies that occurred in 2016.<sup>79</sup> Williams, rather surprisingly, pled not guilty on all counts.<sup>80</sup> Ultimately, Williams was convicted by a jury of one count of conspiracy to commit robbery, three counts of federal robbery, three counts of felon in possession of a firearm, and three counts of

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75. *Id.*

76. *Id.*

77. *Id.*

78. See U.S. SENT’G COMM’N, *supra* note 10, at 1; Arrest Warrant at 1, United States v. Williams, No. 1:19-cr-00029 (E.D. Va. Dec. 21, 2018) [hereinafter Williams Arrest Warrant].

79. Indictment at 1-14, United States v. Williams, No. 1:19-cr-00029 (E.D. Va. Jan. 24, 2019) [hereinafter Williams Indictment].

80. Judgment in a Criminal Case at 1, United States v. Williams, No. 1:19-cr-00029 (E.D. Va. Sept. 13, 2019) [hereinafter Williams Judgment]; see also John Gramlich, *Only 2% of Federal Criminal Defendants Go To Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [https://perma.cc/U4MS-HY8F].

brandishing a firearm during a crime of violence under § 924(c).<sup>81</sup> In September 2019, Williams was sentenced to twenty-three years in federal prison.<sup>82</sup> Two of these years are for the conspiracy, robbery, and felon-in-possession charges; these sentences run concurrently.<sup>83</sup> The remaining twenty-one years are for the § 924(c) charges, calculated under the new sentencing scheme: seven years on each count of brandishing a weapon, to run consecutively.<sup>84</sup>

Because Williams was sentenced after the First Step Act passed, he did not receive “stacked” § 924(c) sentences.<sup>85</sup> His co-defendant was not so lucky. Steven Oneil Houston participated in the same string of robberies.<sup>86</sup> Between August and October of 2016, Houston and Williams stole under \$4,000 from 7-Eleven, Shell, and Exxon convenience stores.<sup>87</sup> The critical difference between the outcome of Houston’s versus Williams’s case was the criminal justice system’s timing.<sup>88</sup>

Houston was arrested on March 2, 2017.<sup>89</sup> He was indicted on seven counts: one count of conspiracy, three counts of robbery, and three counts of brandishing a firearm during a crime of violence under § 924(c).<sup>90</sup> Interestingly, Williams brandished the firearm during two of the three robberies—not Houston.<sup>91</sup> Because Houston had no previous felony charges, he did not face the felon-in-possession

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81. Williams Judgment, *supra* note 80, at 1-2.

82. *Id.* at 3.

83. *Id.* at 1-3.

84. *Id.*

85. See First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222; Williams Judgment, *supra* note 80, at 3.

86. See Williams Indictment, *supra* note 79, at 3-5 (listing the overt acts Williams and Houston took in furtherance of their robbery conspiracy).

87. See Indictment at 13, United States v. Houston, No. 1:18-cr-00127 (E.D. Va. Mar. 22, 2018) [hereinafter Houston Indictment].

88. The relevant date is sentencing. See First Step Act § 403(b). It is, however, ironic that Williams was arrested on the same date the First Step Act passed.

89. Arrest Warrant at 1, United States v. Houston, No. 1:18-cr-00127 (E.D. Va. Apr. 3, 2018) [hereinafter Houston Arrest Warrant]. Arrest warrants for both Houston and Williams were issued on December 16, 2016. *Id.*; Williams Arrest Warrant, *supra* note 78, at 1.

90. Houston Indictment, *supra* note 87, at 1-12.

91. The dates of the robberies Houston was charged with in Counts Two through Four of his Indictment correspond to dates listed in the “overt acts” section of the Count One conspiracy charge, in which “UCC-1” is named as brandishing the firearm during the August 17, 2016, and October 21, 2016, robberies. Houston Indictment, *supra* note 87, at 3-9. It is clear from Williams’s Indictment that he is in fact “UCC-1.” See *id.*; Williams Indictment, *supra* note 79, at 3-5.

charges that Williams did.<sup>92</sup> Houston pled guilty on May 21, 2018, to two of the § 924(c) charges.<sup>93</sup> The presiding district court judge sentenced Houston three months before his co-defendant was arrested and the First Step Act passed.<sup>94</sup> Houston received seven years on the first § 924(c) charge and twenty-five consecutive years on the second § 924(c) charge.<sup>95</sup> Houston’s sentencing judge had absolutely no choice but to send Houston to federal prison for thirty-two years.<sup>96</sup>

The sentencing disparities created by the First Step Act’s elimination of § 924(c)’s stacking provision—and its nonretroactivity—are not hypothetical.<sup>97</sup> Steven Houston received a thirty-two year sentence for two counts of brandishing a weapon that Kenya Williams actually wielded.<sup>98</sup> Meanwhile, Kenya Williams is serving a twenty-three year prison sentence based on ten counts, *three* of which resulted from § 924(c) charges.<sup>99</sup> Williams had eight more charges than his co-defendant but was sentenced to nine less years.<sup>100</sup> The difference? The date of arrest.

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92. Houston, although charged with brandishing a firearm, was not indicted on any felon-in-possession charges. Houston Indictment, *supra* note 87, at 1. This was the only difference between Houston’s and Williams’s indictments. *See id.*; Williams Indictment, *supra* note 79, at 1.

93. Plea Agreement at 1, United States v. Houston, No. 1:18-cr-00127 (E.D. Va. May 21, 2018) [hereinafter Houston Plea Agreement].

94. *See* U.S. SENT’G COMM’N, *supra* note 10, at 1; Williams Arrest Warrant, *supra* note 78, at 1.

95. Judgment in a Criminal Case at 2, United States v. Houston, No. 1:18-cr-00127 (E.D. Va. Aug. 10, 2018).

96. *See* Houston Plea Agreement, *supra* note 93, at 1 (explaining the mandatory minimum sentences under the old § 924(c) sentencing scheme).

97. *See* First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222.

98. *See* Houston Indictment, *supra* note 87, at 3-9; Williams Indictment, *supra* note 79, at 3-5. Houston is currently incarcerated at FCI Fairton. *Inmate Locator*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> [<https://perma.cc/TKG9-46ZW>] (use “Find by Name” and type “Steven” in “First” and “Houston” in “Last”).

99. *Inmate Locator*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> [<https://perma.cc/N94J-MRKX>] (use “Find by Name” and type “Kenya” in “First” and “Williams” in “Last”); Williams Judgment, *supra* note 80, at 3.

100. *See supra* notes 81-83, 89-95 and accompanying text. Rarely will sentencing disparities be as drastic as Marion Hungerford’s. It is important, however, to view the disparity in the eyes of the defendant. Steven Houston faced approximately 3,285 more monotonous days in federal prison than Kenya Williams based solely on the fact that he was arrested *first*.

Congress explicitly made the changes to § 924(c)'s stacking provision non-retroactive.<sup>101</sup> Although Congress's intent is unclear, surely Congress cannot believe that defendants convicted of multiple § 924(c) violations and sentenced before December 21, 2018, are more dangerous or deserve more decades in prison than defendants sentenced after December 21, 2018. Such a suggestion would be absurd. Instead, Congress likely either: (1) failed to recognize the grave injustices that would result from not applying the stacking provision retroactively, or (2) believed that releasing inmates (without any individualized review) who were convicted of multiple § 924(c) charges would be a logistical nightmare. The latter is more likely.

Of note, Congress empowered courts with broad discretion to grant compassionate release in the same Act that it declared the § 924(c) provision changes non-retroactive.<sup>102</sup> And, Congress also required courts to consider the "need to avoid unwarranted sentence disparities" when making their compassionate release determinations.<sup>103</sup> Congress would not have explicitly enacted these two statutes if it did not want courts to utilize them. In fact, the BOP's inactivity in petitioning for compassionate release motivated Congress's transfer of power from the BOP to the courts.<sup>104</sup>

Nonetheless, in the last two years district courts have been wary of granting compassionate release based on sentencing disparities alone.<sup>105</sup> Instead, several courts have considered the disparities alongside rehabilitation, age, and COVID-19.<sup>106</sup>

## II. DISTRICT COURTS: CASE STUDIES

In November 2019, the Nebraska District Court granted Jerry Urkevich's motion for compassionate release.<sup>107</sup> Between 2001 and

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101. See First Step Act § 403(b).

102. See First Step Act §§ 403(b), 603(b).

103. 18 U.S.C. § 3553(a)(6); see also 18 U.S.C. § 3582(c)(1)(A).

104. See *United States v. Redd*, 444 F. Supp. 3d 717, 725 (E.D. Va. 2020).

105. See *infra* Part II.

106. See *supra* note 33 and accompanying text.

107. *United States v. Urkevich*, No. 8:03CR37, 2019 WL 6037391, at \*1 (D. Neb. Nov. 14, 2019).

2003, Urkevich ran a drug operation from his home in Omaha.<sup>108</sup> Law enforcement executed several search warrants during those two years and routinely found guns in his home.<sup>109</sup> A jury convicted Urkevich of one count of conspiracy with intent to distribute meth and three counts of possession of a firearm during a drug trafficking offense.<sup>110</sup> He received fifty-five years on gun charges alone, due to the old § 924(c) stacking provision.<sup>111</sup> The court was the first in the country to grant a motion to reduce a sentence based in part on § 924(c) sentencing disparities.<sup>112</sup> After holding that courts were empowered to determine what constitutes “extraordinary and compelling” reasons for release, the district court considered the § 3553(a) sentencing factors; specifically, the “need for the sentence imposed ... to reflect the seriousness of the offense” and the “need to avoid unwarranted sentence disparities.”<sup>113</sup> After considering these factors, the court reduced Urkevich’s sentence to what he would have been sentenced to post-FSA.<sup>114</sup> It is important to note that the court did not grant Urkevich immediate release—instead it reduced his sentence for each stacked § 924(c) count.<sup>115</sup>

A few months after the *Urkevich* court boldly granted a sentence reduction based largely on sentencing disparities, the COVID-19 pandemic hit federal prisons—hard.<sup>116</sup> A little over a year after Congress removed the BOP as the compassionate release gatekeeper, litigation flooded the courts.<sup>117</sup> Many defendants started petitioning

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108. *United States v. Urkevich*, 408 F.3d 1031, 1033 (8th Cir. 2005).

109. *Id.*

110. *Id.*

111. *Urkevich*, 2019 WL 6037391, at \*1.

112. *See id.* at \*3 (noting that one other court considered a motion with similar facts but declined to grant the motion, finding it premature).

113. *Id.* at \*2-3 (quoting 18 U.S.C. § 3553(a)).

114. *See id.* at \*4.

115. *Id.*

116. *See* Keri Blakinger, *Thousands of Sick Federal Prisoners Sought Release as Covid-19 Spread. Nearly All Were Denied.*, NBC NEWS (Oct. 7, 2020, 6:00 AM), <https://www.nbcnews.com/news/us-news/thousands-sick-federal-prisoners-sought-release-covid-19-spread-nearly-n1242193> [<https://perma.cc/9L38-9N6B>].

117. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239; Clare Hymes, *Compassionate Release, Once Seldom Used, Offers Some Federal Inmates Hope*, CBS NEWS (Sept. 18, 2020, 4:00 PM), <https://www.cbsnews.com/news/compassionate-release-federal-inmates-covid-19/> [<https://perma.cc/4U52-VZPZ>].

the courts directly, requesting relief based on the pandemic, rehabilitative efforts, and § 924(c) sentencing disparities.<sup>118</sup>

Circuit courts are split on whether district court judges have the authority to grant compassionate release (or a reduced sentence) based on § 924(c) sentencing disparities.<sup>119</sup> For example, the Fourth Circuit, in *United States v. McCoy*, held that “district courts permissibly treated as ‘extraordinary and compelling reasons’ ... the severity of the defendants’ § 924(c) sentences” and the disparities created by the First Step Act.<sup>120</sup> The court, however, emphasized the judges’ “individualized assessments of each defendant’s sentence”—including consideration of defendants’ rehabilitation and age at the time of the offense—when upholding their grants of release.<sup>121</sup> On the other hand, the Seventh Circuit, in *United States v. Thacker*, answered “squarely and definitively” that changes to § 924(c) cannot “constitute and extraordinary and compelling reason for a sentencing reduction.”<sup>122</sup>

Many courts, even the ones that have held that a lack of retroactivity does not preclude the defendant from relief, avoid firmly deciding this issue by granting release based on a combination of factors. The *McCoy* district court, for example, granted compassionate release based on the defendant’s age at the time of his sentence, the overall length of his sentence, his impressive rehabilitative efforts, and § 924(c) sentencing disparities.<sup>123</sup> The *Decator* court considered the same factors before granting compassionate release.<sup>124</sup> In April 2020, in the midst of the COVID-19 pandemic, the District Court for the Southern District of Iowa reconsidered a motion for compassionate release.<sup>125</sup> The court denied the defendant’s first motion for release, which was largely based on “his draconian sentence that modern statute would prohibit if given today.”<sup>126</sup> The court had found that although the § 924(c) sentencing

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118. See *supra* note 33 and accompanying text.

119. See generally *United States v. Thacker*, 4 F.4th 569, 575 (7th Cir. 2021).

120. 981 F.3d 271, 286 (4th Cir. 2020).

121. *Id.*

122. 4 F.4th at 576.

123. 2020 WL 2738225, at \*6.

124. 452 F. Supp. 3d at 325-26.

125. *United States v. Brown*, 457 F. Supp. 3d 691, 693-94 (S.D. Iowa 2020).

126. *Id.* at 694.

disparities did seem extraordinary and compelling, it needed an additional reason for the defendant's release.<sup>127</sup> On the motion for reconsideration, the court granted release, finding that "[a] global pandemic that endangers all prisoners ... suffices."<sup>128</sup>

A couple of weeks later, in May 2020, amidst the COVID-19 pandemic,<sup>129</sup> the District Court for the Western District of Virginia took a bold stance.<sup>130</sup> In *United States v. Arey*, after considering the defendant's age (he was sixty-one years old) and his significant health conditions, the court found that the global pandemic did not *alone* create an extraordinary and compelling reason for release.<sup>131</sup> Instead, the court held that the defendant's lengthy sentence under the now amended § 924(c) statute *alone* was a sufficient reason for relief.<sup>132</sup> The court heavily relied on its "independent discretion" in finding that granting release on a sentencing disparity alone is permissible, notwithstanding Congress's decision to make the stacking provision non-retroactive.<sup>133</sup> The Fourth Circuit has not reversed Arey's grant of release.

This Note argues that courts should follow the *Arey* approach. Where the change in law to § 924(c) is new, unclear, and conflicts with other statutes (specifically, the sentencing guidelines section 1B1.13 commentary),<sup>134</sup> courts should use their independent discretion to correct the wrongs created by Congress. This argument is supported by legislative history, policy considerations, and the basic notions of fairness.

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127. *Id.* at 701.

128. *Id.*

129. See *Daily Updates of Totals by Week and State: Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> [<https://perma.cc/QZ6P-ZXDY>].

130. See generally *United States v. Arey*, 461 F. Supp. 3d 343 (W.D. Va. 2020).

131. *Id.* at 345, 351.

132. *Id.* at 351.

133. *Id.* at 350-51.

134. See *supra* Section I.A.2.

### III. THE SECOND STEP: SECTION 924(C) SENTENCING DISPARITIES ALONE CONSTITUTE AN EXTRAORDINARY AND COMPELLING REASON FOR RELEASE

As district courts across the country have concluded, courts are empowered under the First Step Act to determine what factors constitute extraordinary and compelling reasons for compassionate release. Courts can and should use this power to grant compassionate release to defendants whose § 924(c) convictions do not reflect the new sentencing scheme for three reasons: (1) Congress never intended for § 924(c) to require sentence stacking; (2) these defendants will always satisfy at least two of the § 3553(a) sentencing factors; and (3) incarcerating these defendants beyond the current sentencing scheme does not further any correctional goals. When a defendant initiates individualized review by petitioning the court, the presiding judge should keep these points in mind and take the step Congress did not take itself by granting compassionate release.

#### A. *Extraordinary and Compelling: Serving a Mandatory Minimum Sentence Congress Never Intended to Create*

Congress empowered courts with significant discretion to grant compassionate release motions in the very same act Congress amended the § 924(c) stacking provision.<sup>135</sup> Section 403 of the FSA is titled “Clarification of [18 U.S.C. § 924(c)],” suggesting that Congress never intended for courts to stack multiple § 924(c) count sentences.<sup>136</sup> The Supreme Court, however, in *Deal v. United States*, interpreted the ambiguous language in the original § 924(c) statute to require the stacking provision.<sup>137</sup>

In 1993, Justice Scalia, writing for the majority, interpreted the statute as requiring district court judges to stack “second or subsequent ‘conviction[s].’”<sup>138</sup> Specifically, the Court held that the word

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135. See First Step Act of 2018, Pub. L. No. 115-391, §§ 403(b), 603(b), 132 Stat. 5194, 5222, 5239.

136. See *id.* § 403.

137. See 508 U.S. 129, 135 (1993).

138. See *id.* at 132 (quoting 18 U.S.C. § 924(c)(1)).

“conviction” unambiguously “refer[red] to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction.”<sup>139</sup> In his dissent, Justice Stevens, relying on “common sense,” interpreted the statute to mean the exact same as what Congress’s amendment to § 924(c) in the FSA provided.<sup>140</sup>

Twenty-six years later, Congress rejected Justice Scalia’s interpretation and clarified the manner in which district courts should sentence defendants with multiple § 924(c) counts.<sup>141</sup> This clarification is significant. Defendants who did not retroactively receive the sentence leniency of the § 924(c) amendment are not only facing time Congress no longer deems necessary; they are also facing time Congress *never* believed to be necessary.

Now that Congress has spoken and clarified its stance on the § 924(c) stacking provision, it is up to courts to correct the injustice defendants faced by being sentenced under the previously faulty interpretation. Although Congress chose not to exert its own power to make the amended § 924(c) statute retroactive, this does not mean that courts should refrain from using their power to remedy this wrong. Congress implicitly acknowledged in the title of the First Step Act that “it has just begun to rein in its past excesses.”<sup>142</sup> The District Court for the Southern District of Iowa correctly proclaimed that “[i]n cases where it has not—perhaps out of fear it would take too much effort to make so many people whole—courts and those who appear before them should not hesitate to use their powers to right obvious wrongs.”<sup>143</sup>

#### *B. Section 924(c) Sentencing Disparities: Always a Match for Certain Statutory Sentencing Factors*

When courts consider a motion for compassionate release, they must determine whether the defendant presents extraordinary and compelling reasons for release by looking at certain enumerated factors when making their decisions. Congress specified in its

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139. *Id.*

140. *See id.* at 138 (Stevens, J., dissenting); *see also* First Step Act § 403(b).

141. *See* First Step Act § 403(b).

142. *United States v. Brown*, 411 F. Supp. 3d 446, 454 (S.D. Iowa 2020).

143. *Id.*

amended compassionate release statute that courts *must* consider sentencing factors in § 3553(a) “to the extent that they are applicable.”<sup>144</sup> The statute lists seven broad factors.<sup>145</sup> Defendants who did not retroactively receive the sentence leniency of the § 924(c) amendment will *always* invoke two sentencing factors that courts must weigh when they consider compassionate release motions.

First, each defendant who petitions the court for release or a reduced sentence based on § 924(c) sentencing disparities satisfies § 3553(a)(6): “the need to avoid unwarranted sentence disparities among [similarly situated] defendants.”<sup>146</sup> Clearly, a judge deciding a compassionate release motion for a defendant sentenced under the prior version of § 924(c) would find that this factor heavily tips in the defendant’s favor after considering the much more lenient sentences defendants receive under the present law.<sup>147</sup>

Take for instance the cases of Steven Houston and Kenya Williams: Houston was sentenced to thirty-two years for two § 924(c) charges, while Williams faced only twenty-one years for *three* § 924(c) charges.<sup>148</sup> Judges, however, do not need an extraordinary fact pattern like Houston’s and Williams’s for § 3553(a)(6) to apply. Any defendant convicted of two or more § 924(c) violations before December 21, 2018, will be “similarly situated” to any defendant convicted of the same offenses after December 21, 2018.<sup>149</sup>

Second, each defendant sentenced before the First Step Act passed satisfies § 3553(a)(2), which requires courts to consider the “need for the sentence imposed ... to reflect the seriousness of the offense ... and to provide just punishment for the offense.”<sup>150</sup> Because Congress never believed (or, at the very least, no longer believes) that such lengthy sentences are needed, this factor also tips in the defendant’s favor.<sup>151</sup>

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144. See 18 U.S.C. § 3582(c)(1)(A).

145. *Id.* § 3553(a)(1)-(7).

146. See *id.* § 3553(a)(6); see also § 3582(c)(1)(A).

147. See *supra* Part I.B.

148. See *supra* notes 98-101 and accompanying text.

149. See *McCoy v. United States*, No. 2:03-cr-197, 2020 WL 2738225, at \*6 (E.D. Va. May 26, 2020).

150. See § 3553(a)(2)(A); see also § 3582(c)(1)(A).

151. See *supra* Part III.A.

Of note, many of the other § 3553(a) factors are simply irrelevant to defendants petitioning for compassionate release based on § 924(c) sentencing disparities. For example, courts must consider “any pertinent policy statement ... issued by the Sentencing Commission.”<sup>152</sup> As previously discussed, the Sentencing Commission’s compassionate release policy statement has not been updated to reflect the changes to the First Step Act and is thus not pertinent.<sup>153</sup> Additionally, courts must consider “the kinds of sentences available,” but the sentences that were imposed on defendants pre-First Step Act *are no longer available*.<sup>154</sup>

In sum, the § 3553(a) sentencing factors that a court must consider when deciding a motion for compassionate release provide ample support for a court to conclude that the § 924(c) sentencing disparities constitute an extraordinary and compelling reason for release.

*C. Section 924(c) Sentencing Disparities: Never a Match for Correctional Goals or the Basic Notions of Fairness*

Courts, when determining whether to grant compassionate release due to certain sentencing disparities, should consider correctional goals. These include deterrence, incapacitation, rehabilitation, and retribution.<sup>155</sup> None of these goals are satisfied by keeping defendants in prison for decades longer than what Congress currently deems satisfactory.<sup>156</sup>

First, common sense dictates that deterrence—both specific and general—cannot justify the continued incarceration of defendants for longer than what is currently statutorily required. If we assume, for the sake of argument, that the purpose of the federal sentencing scheme is to deter crime, the elimination of the stacking provision demonstrates that the previously lengthy sentences were not necessary to deter crime. As such, there is no support for continuing

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152. § 3553(a)(5).

153. *See supra* Part I.A.2.

154. § 3553(a)(3); *see* First Step Act of 2018, Pub. L. No 115-391, § 403(b), 132 Stat. 5194, 5222.

155. *See* *Graham v. Florida*, 560 U.S. 48, 71 (2010).

156. *See id.* (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”).

to uphold a nullified and antiquated sentencing scheme as a means of deterrence. Those who possess, brandish, or discharge a firearm during multiple crimes of violence or drug trafficking offenses no longer fear the old stacking provision of § 924(c). Additionally, many defendants are likely unaware of the enhanced punishments associated with gun charges, making deterrence as a whole ineffective at lowering crime rates.<sup>157</sup>

Likewise, courts cannot rely on rehabilitation or incapacitation as justifications to deny defendants' motions for compassionate release. Again, for the sake of argument, if we assume that the purpose of the sentencing guidelines is to rehabilitate defendants, the § 924(c) amendment suggests that defendants can be rehabilitated by serving a five-, seven-, or ten-year sentence for each § 924(c) count.<sup>158</sup> It is important to note that under the new sentencing scheme, defendants need not prove a record of rehabilitative efforts to be released after serving their time.<sup>159</sup> This suggests that rehabilitation as a general correctional goal does not justify incarcerating defendants longer than what is statutorily prescribed, no matter the individual characteristics of each defendant.<sup>160</sup>

Additionally, the § 924(c) amendment suggests that defendants only need to be incapacitated for the time currently statutorily prescribed.<sup>161</sup> To reason otherwise would be logically unsound: suggesting that defendants sentenced on or before December 21, 2018, like Steven Houston, are inherently more dangerous or deserving of incapacitation than defendants sentenced after December 21, 2018, like Kenya Williams, is nonsensical.

Finally, courts cannot rely on retribution as justification to deny a defendant's compassionate release motion. Retribution simply refers to punishment—punishing a defendant for the wrong he has committed.<sup>162</sup> Following the same logic above, now that the First Step Act has amended § 924(c), sentencing first-time offenders as

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157. See Athula Pathinayake, *Should We Deter Against General Deterrence?*, 9 WAKE FOREST J. L. & POL'Y 63, 88-89 (2018).

158. See U.S. SENT'G COMM'N, *supra* note 10, at 34-35.

159. See 18 U.S.C. § 3624(a) ("A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment.").

160. See *id.*

161. See U.S. SENT'G COMM'N, *supra* note 10, at 34-35.

162. See *Graham v. Florida*, 560 U.S. 48, 71 (2010).

repeat offenders is no longer considered necessary to sufficiently punish defendants.<sup>163</sup> Thus, it does not follow that defendants sentenced under the old scheme should receive harsher punishment.

Putting aside all of the justifications for incarceration, judges should consider *fairness*. That our *justice* system allows for a defendant sentenced one day before a congressional vote to be sentenced decades longer than a defendant sentenced for the same crimes one day later violates all basic notions of fairness. History is repeating itself: Congress passed the Fair Sentencing Act in 2010, reducing the sentencing disparities between offenses for crack and powder cocaine, but it did not originally make the sentencing amendments retroactive.<sup>164</sup> Taking “another step toward fairness,” the United States Sentencing Commission voted to retroactively apply the new sentencing guidelines.<sup>165</sup> Here, Congress once again took a small step towards fairness, but courts now must take another step. These sentencing disparities, like those created by the Fair Sentencing Act, warrant sentence reductions.

District courts have the discretion to grant compassionate release whenever they find extraordinary and compelling reasons for relief present.<sup>166</sup> After considering Congress’s “clarification” of the § 924(c) sentencing scheme, § 3553(a) sentencing factors, and the common penological goals, the § 924(c) sentencing disparities Congress created are *alone* extraordinary and compelling reasons for relief. Courts need not examine a defendant’s age, rehabilitation efforts, or the presence of a global pandemic to release defendants serving grossly unjust sentences. This Note argues that the § 924(c) sentencing disparities are a greater reason for release than a defendant’s age or an arbitrary assessment of their rehabilitative efforts.

#### IV. ADDRESSING LIKELY COUNTERARGUMENTS

Despite legislative history, sentencing factors, correctional goals, and the basic notions of fairness all pointing to the idea that courts

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163. See U.S. SENT’G COMM’N, *supra* note 10, at 34-35.

164. *Fair Sentencing Act*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act> [<https://perma.cc/6CYK-YGBD>].

165. *Id.*

166. See *supra* notes 71-73 and accompanying text.

should grant compassionate release to defendants sentenced under the old § 924(c) sentencing scheme, there are pertinent, likely counterarguments. This Part addresses and rebuts critics' concerns.

First, courts using their compassionate release power to grant release to defendants based solely on § 924(c) sentencing disparities are likely to be critiqued for intervening with congressional intent. Critics may argue that courts cannot in essence make retroactive a law that Congress explicitly made non-retroactive. However, as detailed above, Congress amended § 924(c) in the same act that it gave courts broad power to determine what constitutes an "extraordinary and compelling" reason for release.<sup>167</sup> Congress thus opted for an individualized review process through the courts rather than releasing every defendant sentenced under the old scheme at once.<sup>168</sup>

Second, critics may also raise concerns with courts creating uncertainty in sentencing. The goal commonly associated with determinate sentencing schemes is increasing certainty in the amount of time served.<sup>169</sup> This principle exists largely to comfort crime victims and society as a whole.<sup>170</sup> But incarcerating defendants beyond the statutorily proscribed time period in order to comfort victims is not justifiable. The criminal justice system does not regularly accommodate victims—prosecutors charge abusers with domestic violence against victims' wishes, and judges, although sometimes taking victim impact statements into account, ultimately decide a defendant's sentence.<sup>171</sup> Defendants currently serving multiple § 924(c) sentences under the prior stacking scheme face decades of extra time compared to their peers who were sentenced under the current scheme.<sup>172</sup> If one balances the victim's wishes for a defendant to serve his original sentence with the 5,475 minimum additional

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167. See *supra* notes 101-03 and accompanying text.

168. See *supra* Part I.B.

169. See ALISON LAWRENCE, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 4 (2015), <https://www.ncsl.org/documents/cj/sentencing.pdf> [<https://perma.cc/35FW-WLHJ>].

170. See *id.*

171. See Robert C. Davis, Frances Kunreuther & Elizabeth Connick, *Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 492 (1984).

172. See *supra* Part I.B.

days that the defendant must serve under the outdated law,<sup>173</sup> surely the scale tips in the defendant's favor.

Finally, critics may question whether this Note argues that *any* sentencing disparity should be grounds for compassionate release. Because judges often give vastly different sentences for the same crime, granting compassionate release on that ground alone would open up doors to thousands of inmates.<sup>174</sup> This Note, however, only argues that sentencing disparities created by the § 924(c) amendment warrant reduced sentences. That Congress indirectly created the § 924(c) sentencing disparities distinguishes them from ordinary sentencing disparities. Disparities created by the § 924(c) amendment are indiscriminate, unlike a judge's consideration of an individual defendant's personal characteristics. These distinctions draw the line between a reason for a reduced sentence and an "extraordinary and compelling" reason for a reduced sentence.

#### CONCLUSION

Congress took the first step by clarifying the § 924(c) sentencing scheme; courts must now take the second step to right Congress's wrongs. Steven Oneil Houston and countless other inmates sit behind federal prison bars, knowing that they were sentenced to prison time Congress itself finds excessive. Meanwhile, Kenya Williams, along with every defendant convicted of multiple § 924(c) violations and sentenced after December 21, 2018, serve decades less time under the new and more progressive scheme.

When Kenya Williams reaches the end of his sentence, the Bureau of Prisons will not require an in-depth review of his (arbitrary) rehabilitative efforts. He will not be required to prove extraordinary or compelling reasons for release. Instead, he will be escorted out of jail without having to file a motion with the court and regardless of

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173. The closest gap between the prior sentencing scheme and the current sentencing scheme that could occur is fifteen years. A defendant who discharged a gun twice and was sentenced before the FSA passed would receive a thirty-five year sentence (10 years for the first count and 25 years for the second). *See* U.S. SENT'G COMM'N, *supra* note 10, at 34-35. A defendant with the same charges who was sentenced post-FSA would receive a twenty-year sentence (two 10-year sentences). *See id.*

174. *See* Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1269-70 (2014).

his conduct while in prison. Congress, as detailed in the text of the First Step Act, presumes that Williams is deserving of release. Why, then, are district courts requiring so much from defendants similarly situated to Steven Houston?

District courts are reluctant to intrude into congressional territory, but Congress *gave* them an extraordinary amount of discretion.<sup>175</sup> In the same act, Congress amended § 924(c) and provided defendants sentenced under the prior version a method for individualized review.<sup>176</sup> Each defendant that petitions a court for compassionate release due to § 924(c) sentencing disparities has several § 3553(a) sentencing factors weighing in his or her favor.<sup>177</sup> Absent unusual circumstances (for instance, an inmate who has a significantly increased propensity for violence since being incarcerated), each of these defendants sentenced under the old § 924(c) scheme *will* have an extraordinary and compelling reason for release.

Courts cannot count on Congress, and they cannot count on prosecutors, to fix these injustices in the criminal justice system. No one convicted of possession of a firearm during a crime of violence or a drug trafficking offense should serve more time than a terrorist or murderer,<sup>178</sup> even if they actually wielded a gun. Congress signaled an understanding of this idea by fundamentally changing the law. It is now time for courts to take the second step that Congress was not willing to take itself.

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175. See First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239; *supra* Part III.A.

176. See First Step Act §§ 403(b), 603(b).

177. See *supra* Part III.B.

178. See *United States v. Rivera-Ruperto*, 884 F.3d 25, 32 (1st Cir. 2018) (Barron, J., concurring) (quoting *United States v. Rivera-Ruperto*, 852 F.3d 1, 31 (1st Cir. 2017) (Torruella, J., dissenting)).